No. 85131-0

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF:

HOYT WILLIAM CRACE,

PETITIONER.

PETITIONER'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Responding to the drug-fueled voices in his head, Hoyt Crace ran through a mobile home park with a sword in his hand until he realized a police officer was standing in front of him. When reality set in, he dropped the sword; fell to the ground; and was arrested. Crace testified that he did not intend to assault the police officer who commanded Crace to drop the weapon.

Crace was charged with second-degree assault, as well as trespass and malicious mischief. At trial, jurors were instructed on the crime charged and were also given a lesser-included offense instruction for attempted second-degree assault. Crace did not object to the lesser. However, because Crace had two prior "strikes," the penalty for both the charged and lesser crime was life without parole. Crace's jury could not agree on the crime charged and convicted him of attempted assault.

Although the facts supported it, Crace's attorney did not offer an instruction for unlawful display of a weapon (RCW 9.41.270(1)). That offense has a maximum sentence of one year, rather than a minimum of life. This was not a tactical choice. Crace's trial counsel now admits that he simply did not consider the "unlawful display" lesser and did not discuss the option with Crace. In this PRP, Crace claims ineffective assistance of counsel based on the failure to offer the "unlawful display" lesser.

This Court recently decided a similar case—albeit a case with some important differences from this case. See *State v. Grier,* 171 Wash.2d 17, 246 P.3d 1260 (2011). *Grier* overruled prior precedent, including the caselaw cited by the lower court when it reversed Crace's conviction. Although the law has changed, the result in this case should not. Applying *Grier* to this case mandates reversal, or at least remand for an evidentiary hearing.

Grier can be distinguished in two main ways.

First, this is not a case, like *Grier,* where defendant and defense counsel agreed to pursue an "all or nothing" approach. Instead, this is a case where a lesser-included offense instruction was given. However, that lesser carried the same life sentence as the original charge. The only reason counsel did not propose an additional lesser included offense instruction simply because he did not consider the option.

Second, this is a PRP—not a direct appeal. This Court noted at the outset in *Grier*: "When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record." 171 Wn.2d at 29. Obviously, that is not true in a PRP, where the Court can remand for an evidentiary hearing. RAP 16.11(b).

Crace is likely serving a life sentence today *not* as the result of a considered strategy that Crace agreed to after discussions with counsel, *but* instead because of an oversight by counsel.

If the State does not contest Crace's facts and disclaims the need for an evidentiary hearing, this Court should affirm the Court of Appeals' decision reversing Crace's conviction. Otherwise, this Court should remand this case to the trial court for an evidentiary hearing or for a determination on the merits after an evidentiary hearing.

II. FACTS

Hoyt William Crace was convicted of attempted second degree assault, first degree criminal trespass, and second degree malicious mischief.

On August 16, 2003, after consuming a large amount of drugs, Crace fell asleep or partially overdosed while watching the movie "Planet of the Apes." The PRP opinion below summarized the facts as follows:

> When he awoke, it was dark outside. Crace testified that he heard and saw things, grew terrified, and became convinced that he was going to be murdered. He ran screaming from his trailer, trying to find the home of two elderly women who lived nearby; instead, he entered Rita Whitten's trailer by mistake. Crace tried to tell Whitten about his fears but, when she kept screaming, he quickly left.
>
> Before Crace's entry, Whitten was in her living room watching television while her baby slept in the bedroom. According to Whitten, Crace burst through the front door, screaming about being pursued. After rifling Whitten's kitchen cabinets and drawers, Crace ran out of her home. According to Crace, he went outside and found the elderly women's trailer and spoke to them, but he did not stay there because he still thought that humans or demons were trying to murder him.
>
> Crace returned to his trailer, took a sword off the wall, and ran down the street screaming for help. Apparently someone contacted the police, because on August 17, 2003, at 2:25 AM, Pierce County

> Sheriff's Deputy Theron Hardesty received a call from dispatch directing him to a possible burglary in progress at a residence in a mobile home park. As Hardesty exited his car, a man approached him and stated that an unknown male had burst into his neighbor's home and then fled. The man said that the unknown male had run about two blocks to the north and that he was armed with a sword.
>
> Hardesty found Crace and when Crace saw Hardesty's flashlight beam, he ran toward the light with his sword in hand. Crace made eye contact with Hardesty and ran full speed toward him. As Crace ran, he yelled, " 'They are after me, someone help me.' " Report of Proceedings (RP) at 83.
>
> Hardesty could see a long, metal object in Crace's hand and, as Crace drew closer, Hardesty identified the object as a sword. Hardesty drew his gun and directed Crace to drop the sword. Crace kept running at Hardesty and Hardesty repeated his command to drop the sword. According to Crace, when he realized that an officer held the flashlight, he remained too frightened to drop the sword or to stop. Crace dropped the sword when he was approximately 50 feet from Hardesty but he continued running toward Hardesty. Hardesty repeatedly commanded Crace to get on the ground. According to Crace, he did not obey the direction to lie down on the ground because he was scared and still too far away from the officer. Crace finally complied when he was five to seven feet from Hardesty.

157 Wn.App. at 88-91.

Officer Hardesty testified that Mr. Crace ran in his direction with a sword in hand and did not initially stop when ordered to do so. RP 88. However, when asked if Crace "did anything to indicate to you that he was going to hit you or do something to you", other than "coming at you," the officer responded: "No he didn't—he didn't swing at me or anything." RP 88.

Crace's defense was that he either did not and/or could not form the required intent, although he admitted to doing the actions described

previously. Mr. Crace testified he did not intentionally assault Officer Hardesty:

> Q: Where were you when you first saw the police officer?
>
> A: I never saw the officer. I saw a flashlight right here. A beam. Because I was...I was yelling, "Help, help"....I was scared...So, I started running towards the light.
>
> Q: Okay. Could you identify who was shining the light....?
>
> A: No, not until I got about in this area here. Because then I saw the car....and I seen the Pierce County logo on the side reflection.
>
> Q: When you saw this light, what was your reaction?
>
> A: ....when I was screaming, the light finally hit me, and my first thing was to run into it....I wanted to get by them...I was scared.
>
> ****
>
> Q: When you noticed it was a police car, did you change what you were doing Did you slow down? Did you walk?
>
> A: Well, when I realized it was a police car was about the same time the officer identified himself....

RP 124-25.

Later, Crace testified that he continued to run for short time after recognizing that a police officer was shining the light not because he intended to assault the officer, but because Crace felt "I was dead if I stopped," because, as he explained, he feared someone was trying to kill him. RP 126. Crace stated that he dropped the sword when he was able to clearly identify the person with the light as a police officer. RP 128.

Crace further testified:

> A: I had no intention [of] assaulting anybody. I felt as though I was going to be the one that got the assault.....
>
> Q: And you were running towards the light for safety?
>
> A: Yeah.
>
> Q: Were you planning on attacking anyone with the sword?
>
> A: No.

RP 135. *See also* RP 144 (I wanted to make sure who it was. Soon as I realized who it was. I laid down.").

Not only did Crace testify that that he never formed the intent to injure or frighten the police officer:

> Dr. Vincent Gollogly, a [] psychologist, testified for the defense. He said that Crace's voluntary intoxication led to a delusional state. Gollogly also concluded that Crace could not realize the nature of his actions due to drug ingestion. Gollogly explained that, in his opinion, Crace could not accurately appraise the situation, although he could still engage in goal-directed behavior. Gollogly believed that Crace panicked and thought unclearly at the time of the offense. Gollogly testified that Crace could not form the requisite intent to commit assault, malicious mischief, or criminal trespass.

157 Wn.App. at 91, n.2.

Dr. Gollogly further opined that Crace did not have the ability to form the intent to assault: "My conclusion was that he did suffer from diminished capacity at the time of the offense, and that his mental condition was such that he wasn't able to realize the nature of what he was

doing....that he had a diminished capacity defense and didn't know what he was doing." RP 173. Dr. Gollogly was asked:

> Q: Do you think this psychotic situation could, in fact, affect his ability to form the intent in regards to assault?
>
> A: I think that what is happening is that, you know, he was not in a state to accurately kind of look at all the kind of courses of action he could take, appraise the situation, make decisions about what he's got to do...I just feel he was in a total panic and wasn't able to think clearly at the time....I don't see that he wanted to go and try and attack the police, he was wanting the police to come and protect him.....

RP 176-77.

The trial court instructed the jury not only on the charged offenses, but also on the lesser included offense of attempted second degree assault. Despite giving one lesser included instruction, Crace's trial counsel did not request and the trial court did not instruct the jury on the additional lesser included offense of unlawful display of a weapon. The lesser included offense of attempted assault, like the original charge, was a "most serious offense." As a result, Crace faced a life sentence on that count—the same sentence that accompanied the original charge. In contrast, unlawful display of a weapon is a gross misdemeanor with a one year maximum sentence.

The record does not reveal any discussions between Crace and counsel about the decision not to seek the "unlawful display" lesser. Counsel, Robert DePan, admits in a sworn statement that the only reason he

did not request the "unlawful display" lesser is because he did not consider it. Counsel further admits he did not discuss the option with Crace.

The jury deadlocked on the second degree assault charge, but found Crace guilty of attempted second degree assault. The jury also convicted him of first degree criminal trespass and second degree malicious mischief. Under the Persistent Offender Accountability Act, RCW 9.94A.555, the trial court sentenced Crace to life without the possibility of early release based on two previous violent convictions. He was sentenced to 29 months on the other felony and a suspended sentence on the malicious mischief misdemeanor.

III. ARGUMENT

Introduction

A criminal defendant is denied his Sixth Amendment guarantee of effective assistance of counsel when counsel fails to request a lesser included instruction simply because he did not consider the option. At trial, Crace's jury considered two offenses, both of which carried mandatory life sentences (although the jury was not instructed on the penalties). As a result of defense counsel's oversight, Crace's jury was not instructed on a *second* lesser offense—one that would have resulted in a maximum one year sentence.

This is not a case where this Court "must proceed on the basis that defense counsel consulted with [defendant] as to the exclusion of lesser

included offenses and that [defendant] agreed to defense counsel's withdrawal of these instructions." *Grier,* 170 Wn.2d at 30. Quite to the contrary, the record does not reveal any consideration or discussions about the "unlawful display" lesser. And, counsel admitted that he neither considered the option nor discussed it with Crace. Because this is a PRP, this Court also has the option of remanding for an evidentiary hearing to determine what happened off the record. RAP 16.11.

As a result, this Court can either reverse or remand to the trial court for a hearing.

The Right to an Instruction on a Lesser Included Offense

A defendant is entitled to an instruction on a lesser included offense when there is some evidence that only the lesser offense was committed. This Court has repeatedly held a defendant has an "absolute right" to have the jury consider the lesser-included offense on which there is evidence to support an inference it was committed. *State v. Warden*, 133 Wn.2d 559, 947 P.2d 708 (1997); *State v. Parker,* 102 Wn.2d 161, 683 P.2d 189 (1984); *State v. Jones,* 95 Wn.2d 616, 628 P.2d 472 (1981). Other courts have likewise emphasized the necessity for instructing the jury on available lesser-included offenses. In *United States v. Hernandez*, 476 F.3d 791 (9th Cir. 2007), for example, the defendant was charged with possession with intent to distribute and importation of more than fifty grams of methamphetamine. The district court refused his request to instruct on the

lesser included offense of simple possession, and the jury convicted him on both counts. *Id.* at 795. Finding that the refusal to instruct was not harmless, the federal court reversed, stating even if it was more probable that a drug distribution was intended by Hernandez, "we cannot say that a rational jury could not have concluded that Hernandez possessed the methamphetamine for personal use. The government did not show that the jury's only option on the evidence was to find intent to distribute beyond a reasonable doubt." *Id.* at 800. *See also United States v. Arnt*, 474 F.3d 1159 (9th Cir. 2007)(reversing voluntary manslaughter conviction based on trial court's refusal to instruct jury on lesser-included offense of involuntary manslaughter).

This Court presumes harm from the failure to properly instruct the jury, unless the error affirmatively appears harmless. See *State v. Belmarez,* 101 Wn.2d 212, 216, 676 P.2d 492 (1984).

In deciding whether a lesser included offense instruction is warranted, Washington courts view the facts in the light "most favorable" to the defendant. See *State v. Smith,* 154 Wn.App. 272, 223 P.3d 1262 (2009)("The factual prong of *Workman* is satisfied when, viewing the evidence in the light most favorable to the party requesting the instruction, substantial evidence supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater one.").

Crace easily meets that standard. Crace testified that he did not intend to assault the office. That testimony alone justifies the lesser instruction. However, he also presented a diminished capacity defense. Standing alone that testimony also justifies the instruction. Taken together, this evidence overwhelmingly supports the lesser instruction. Applying the correct legal standard to facts viewed most favorably to Crace, it is clear that Crace was entitled to the lesser of unlawful display of a weapon. The difference between the assault and the weapons offense is the *mens rea*—the intent to assault. Crace's expert testified that Crace was unable to form the intent to assault. Crace testified that he actually did not form the intent to assault. Indeed, this is precisely why the trial court gave a lesser instruction of attempted assault. Further, the fact that the jury convicted of the lesser (which was nevertheless still a "strike" and therefore meaningless for sentencing purposes) is compelling proof of prejudice, not to mention also provides justification for the lesser.

Crace was entitled to an unlawful display of a weapon instruction—if his counsel had only requested one.

Counsel's Failure to Consider a Meaningful Lesser Constitutes Deficient Performance

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence." The Supreme Court's "decisions have emphasized that the Sixth

Amendment right to counsel exists 'in order to protect the defendant's fundamental right to a fair trial.' " *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (quoting *Strickland v. Washington*, 466 U.S. 668, 684 (1984)).

Strickland establishes the benchmark by which a claim of ineffective assistance of counsel must be evaluated. First, the petitioner must show that his counsel's performance was deficient. Second, he must show that the deficient performance prejudiced him by denying him a fair trial. To demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Counsel's failure to request a lesser constitutes deficient performance where the failure is the result of ignorance of the law. In *United States v. Alferahin*, 433 F.3d 1148, 1161-62 (9th Cir. 2006), for example, the district court submitted legally insufficient jury instructions regarding the materiality element of the crime. Trial counsel not only failed to object to the erroneous instruction, he rejected a suggestion that an instruction on the materiality element be submitted. This Court reversed, finding that the failure prejudiced the defendant. The Court held that, where trial counsel's errors regarding the jury instructions were not a strategic decision to forego one defense in favor of another, but based on a

misunderstanding of the law, counsel's error constituted ineffective assistance. Also, in *United States v. Span*, 75 F.3d 1383 (9th Cir. 1996), trial counsel failed to propose proper jury instructions on the petitioner's only defense. This Court held that counsel was therefore ineffective.

Richards v. Quarterman, 566 F.3d 553 (5th Cir. 2009), is directly on point. In *Richards*, the Fifth Circuit held that defense counsel rendered ineffective assistance in failing to request a lesser included offense instruction. Counsel's performance in that regard "fell below an objective standard of reasonableness and . . . the state court's conclusion to the contrary was an unreasonable application of *Strickland." Id.* at 570.

On the other hand, a defense counsel's performance is not constitutionally ineffective if he or she, "with adequate knowledge of the law and the evidence," chooses not to request a lesser included offense instruction as long as such a choice is reasonable. *Butcher v. Marquez,* 758 F.2d 373, 376-77 (9th Cir.1985).

The key to *Grier* was that counsel made a choice not to offer a lesser included instruction—a choice which the defendant knew about and agreed to. Crace's case presents a much different scenario. Crace's attorney did not make a choice because he did not consider the one lesser that could have made a difference. As a result of counsel's failure, Crace was not informed of the available and lesser and was not permitted an opportunity to choose. Counsel's failure was the very definition of deficient

performance. Counsel's failure meant that Crace's jury considered a meaningless lesser and did not consider a lesser that carried a significantly lower punishment.

There Was a Reasonable Probability that the Jury Would Have Convicted Crace Only of Unlawful Display of a Weapon

In a PRP, a petitioner claiming constitutional error or fundamental defect at trial must show that he was *actually and substantially prejudiced* by the error. *In re Personal Restraint of Cook,* 114 Wn.2d 802, 812, 792 P.2d 506 (1990).

When a petitioner establishes ineffective assistance of counsel (deficient performance that resulted in prejudice), he has necessarily demonstrated that he was actually and substantially prejudiced by the error. *See In re Dalluge,* 152 Wn.2d 772, 100 P.3d 279 (2004). Conversely, a petitioner who claims IAC and establishes deficient performance, but not a reasonable probability of a different trial outcome, is not actually and substantially prejudiced by the error.

A defendant is prejudiced by the counsel's failure to offer a lesser where there is a reasonable probability that the jury would have convicted of that lesser crime. "This requirement is based on the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free." *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3rd Cir. 1988)

(citing *Keeble v. United States*, 412 U.S. 205, 213 (1973) ("Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction."). In *Keeble*, since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. The Supreme Court concluded: "We cannot say that the availability of a third option-convicting the defendant of simple assault-could not have resulted in a different verdict." *Id.*

On the other hand, courts reject a claim of prejudice based on the failure to give a second lesser where the jury convicts of the charged crime and not the lesser offered. *See State v. Hansen,* 46 Wash.App. 292, 297-98, 730 P.2d 706, 737 P.2d 670 (1986) (trial court's failure to instruct on lesser included offense of unlawful imprisonment harmless where court instructed on first and second degree kidnapping but jury convicted the defendant of first degree kidnapping); *State v. Barriault,* 20 Wash.App. 419, 427, 581 P.2d 1365 (1978) (defendant not prejudiced by court's failure to give second degree manslaughter instruction where court instructed on second degree murder and first degree manslaughter and the jury convicted the defendant of the greater offense).

The instant case presents a situation similar to *Keeble.* There was evidence that Crace displayed a weapon in a manner that caused alarm, but there was also evidence that Crace did not intend to frighten or intimidate others. In short, there was evidence that Crace did not commit an assault, but did display a weapon in a manner that warranted alarm.

Unlawful display of a weapon is a lesser included offense of second degree assault with a deadly weapon. *State v. Baggett*, 103 Wn.App. 564, 13 P.3d 659 (2000). See also *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000); *State v. Ward*, 125 Wn.App. 243, 104 P.3d 670 (2004). Assault requires specific intent. In contrast, unlawful display requires only proof that the defendant carried, exhibited, or displayed a weapon in a manner, under circumstances, and at a time and place that warranted alarm for the safety of other persons. In other words, the statute only requires that the "circumstances" warrant alarm for the safety of others. The circumstances do not need to actively cause such alarm. *State v. Workman*, 90 Wn.2d 443, 582 P.2d 382 (1978). Instead, a reasonable person standard is incorporated into the phrase "warrants alarm." *State v. Spencer,* 75 Wash.App. 118, 876 P.2d 939 (1994). The facts of *Spencer,* which are remarkably similar to the facts of this case, illustrate the application of unlawful display charge to this case. In *Spencer,* the court noted:

> Any reasonable person would feel alarmed upon seeing, on a residential street at night, a man carrying a visibly loaded AK-47 assault rifle in an assaultive manner. This alarm would be

> intensified if the man was walking briskly with his head down and avoiding eye contact with passers-by, as Spencer was doing. Furthermore, our conclusion that Spencer's conduct warranted alarm is supported by the kinds of people who were alarmed in this case, including several firefighters, a police officer, and a passing motorist.

75 Wn. App. at 127.

There is a reasonable likelihood that jurors would have similarly concluded in this case, after all jurors had enough doubts about the original charge that they hung. Further, there was evidence presented that Crace did not have the requisite mens rea, required for both assault and attempted assault. As a result, Crace was prejudiced because his attorney's failure to consider the option deprived Crace the opportunity for his jurors to consider a lesser offense with a lesser penalty.

The Harm Standard for an Ineffectiveness Claim in a Post-Conviction Proceeding

The Sixth Amendment guarantees effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668 (1984). Most constitutional errors require the state to prove harmlessness beyond a reasonable doubt on direct appeal. An ineffective assistance of counsel claim, whether reviewed on direct appeal or in post-conviction, requires a showing that there is a reasonable probability of a different outcome but for the deficient performance of counsel.

In a PRP, a petitioner claiming constitutional error or fundamental defect at trial must show that he was *actually and substantially prejudiced*

by the error. *In re Personal Restraint of Cook,* 114 Wn.2d 802, 812, 792 P.2d 506 (1990).

When a petitioner establishes ineffective assistance of counsel (deficient performance that resulted in prejudice), he has necessarily demonstrated that he was actually and substantially prejudiced by the error. *See In re Dalluge,* 152 Wn.2d 772, 100 P.3d 279 (2004).

This is not an open issue. Indeed, *Strickland* itself was a post-conviction case. In adopting this prejudice standard, the Court took note that it was reviewing a *habeas* case where (like a PRP) the burden of establishing prejudice lies with petitioner. The Court, however, noted:

> The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the 'cause and prejudice' test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

Id. at 698. *See also Hill v. Lockhart,* 28 F.3d 832, 839 (8th Cir. 1994) ("it is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective assistance of counsel.").

This Court has previously applied the *Strickland* standard in PRPs.

See also In re PRP of Brett, 142 Wn.2d 868, 16 P.3d 601 (2001) (Granting PRP after finding "Brett has shown by a preponderance of the evidence there is a reasonable probability that, but for counsel's errors, the results of his trial would have been different."); *In re PRP of Davis,* 152 Wn.2d 647, 101 P.3d 1 (2004) (Granting sentencing relief on an IAC claim where there is a reasonable probability that, absent the error, the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.").

Indeed, since ineffectiveness is a violation of the constitutional right to counsel, one could argue that on direct appeal the State should bear the burden of proving the harmlessness of the error beyond a reasonable doubt. While that is not the standard that has been adopted, it is not a reason to require a defendant to prove "double" prejudice in an ineffectiveness case brought in a PRP.

The Court of Appeals correctly defined and applied the appropriate harm standard in this case. Confidence in Crace's verdict is undermined by counsel's failure to offer the lesser included instruction. There is a reasonable likelihood that Crace would not have been convicted of attempted assault, but only of unlawful display of a weapon if counsel had considered the obvious advantages from offering Crace's jurors that additional instruction.

IV. CONCLUSION

This Court should either reverse or remand for an evidentiary hearing.

DATED this 15th day of August, 2011.

Respectfully Submitted:

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Attached is Mr. Crace's supplemental brief for filing, which has been served on prosecutor's office.

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